No. 86-656

Supreme Court, U.S.
FILED
APR 2 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RONALD W. REAGAN, *et al.*, *Petitioners*,

—v.—

JAMES ABOUREZK, *et al.*, *Respondents*.

GEORGE P. SHULTZ, *et al.*, *Petitioners*,

—v.—

CITY OF NEW YORK, *et al.*, *Respondents*.

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BRUCE CRONIN, *et al.*, *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE COMMITTEES ON IMMIGRATION AND NATIONALITY LAW AND INTERNATIONAL HUMAN RIGHTS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS *AMICUS CURIAE*

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STATEMENT OF INTEREST

This brief *amicus curiae* is submitted with the consent of the parties, pursuant to Rule 36 of the Rules of this Court, on behalf of the Committee on Immigration and Nationality Law and the Committee on International Human Rights (the "Committees") of the Association of the Bar of the City of New York (the "Association"), and in support of respondents. The Association is a not-for-profit corporation formed in 1871. Its original corporate charter, adopted by the New York State Legislature (L. 1871, c. 819), states that the purposes of the Association include, *inter alia*, "cultivating the science of jurisprudence, promoting reforms in the law, [and] facilitating and improving the administration of justice . . . ."

The Committees are dedicated to the thorough analysis and correct interpretation of the immigration laws in a manner that is consistent with the First Amendment right to receive information and ideas and with international instruments promoting the free international exchange of information and ideas. The issue posed in this case is whether Section 212(a)(27) of the Immigration and Nationality Act of 1952, as amended, 8 U.S.C. § 1182(a)(27), should be interpreted to mean that visas may be denied on purely ideological grounds in violation of First Amendment rights and international law.

This brief is submitted to demonstrate that a thorough and proper analysis of Section 212(a)(27) shows that the statute does not authorize the denial of visas on purely ideological grounds. An alternative interpretation of this statute would result in a deprivation of First Amendment rights on purely ideological grounds, a step far beyond the limited restrictions on First Amendment rights the Supreme Court has allowed to date. The denial of visas on purely ideological grounds would also violate international commitments undertaken by the United States to promote the free exchange of information and ideas.

SUMMARY OF ARGUMENT

The proper statutory interpretation of 8 U.S.C. § 1182(a)(27) (Immigration and Nationality Act, "I.N.A.", the "Act", Sec. 212(a)(27)) requires affirmative answers to the two questions presented for review by this Court. The proper interpretation of I.N.A. Sec. 212(a)(27) upholds basic First Amendment rights and adheres to important international law principles to which the United States is formally committed regarding the free exchange of information and ideas.

Not only does a plain reading of the language of the statute result in a positive response to the first question; the legislative history of Section 212(a)(27) and its predecessor statute further confirms that the subsection only permits denial of a visa to an alien if his "activities", not his mere "presence or entry", would prejudice the public interest. A thorough review of this legislative history shows that the prevention of the use of diplomatic status as a "screen" for "subversive activity" represents the basic purpose of Section 212(a)(27).

Administrative construction of the statute provides further support for respondents' position that mere "presence or entry" is insufficient to justify the denial of a visa. The Attorney General, through decisions by the Board of Immigration Appeals, has insisted that a finding of inadmissibility under Section 212(a)(27) be only on the basis of "activities". The State Department, which must follow the Attorney General on matters of law concerning visa eligibility, has underlined in its internal guidelines the critical importance of the threat of "activities" by a visa applicant.

Visa ineligibility under Section 212(a)(27) must be considered independently of visa ineligibility under Section 212(a)(28). To hold otherwise would evade the purpose of the McGovern Amendment which provides that the State Department should approve the nonimmigrant visa application of an alien who is excludable only because of his membership in or affiliation with a proscribed organization unless the admission of such alien would pose a threat to

United States "security interests." The reasoning of the court below on this issue is further supported by the statutory waiver provisions and the State Department's internal practice, as illustrated in the Foreign Affairs Manual.

An alternative construction of Section 212(a)(27) would not only be inaccurate; it would also violate this Court's interpretation of fundamental First Amendment rights and conflict with universally recognized principles promoting the free international exchange of information and ideas.

As recognized in *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972), First Amendment rights are implicated when, as in the instant case, American citizens invite aliens to speak publicly in the United States and engage in "face-to-face debate". The refusal of visas to Tomas Borge, Nino Pasti, Olga Finlay and Leonor Rodriguez Lezcano has prevented the free exchange of ideas and violated respondents' rights to receive information. Nor is there any sufficiently compelling countervailing governmental interest to justify the restriction of the First Amendment rights at issue in this case.

The misapplication of Section 212(a)(27) in the past has led to the unconstitutional pattern of denying visas on purely ideological grounds, as discussed in the March, 1984 *Report on Visa Denials on Ideological Grounds: An Update* by the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York ("Immigration Committee Report"). The correct interpretation will end this unconstitutional pattern. When, as in the instant case, " 'a construction of the statute is fairly possible by which [a serious doubt of constitutionality] may be avoided . . . a court should adopt that construction'." *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979).

In the alternative, if this Court is swayed by petitioners' position on the interpretation of Section 212(a)(27), then the Court should strike that subsection as unconstitutionally vague and overbroad. The government may only regulate in the free speech area with "narrow specificity." *NAACP v. Button*, 371 U.S. 415 (1963). Nor is it permissible for the government "unduly to infringe [a] protected

freedom." *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940).

The denial of a visa application on solely ideological grounds would violate major international instruments such as the United Nations Charter and the Universal Declaration of Human Rights which encourage and affirm the need for the free international exchange of information and ideas. Such a denial would further conflict with the obligations of the United States under the Helsinki Final Act to "facilitate the freer and wider dissemination of information of all kinds." The Court should attempt to construe the statute, if fairly possible, to avoid such conflict.

ARGUMENT

I

THE PLAIN MEANING, LEGISLATIVE HISTORY AND ADMINISTRATIVE CONSTRUCTION OF SECTION 212(a)(27) SHOW THAT A VISA CAN BE DENIED ONLY IF THE ALIEN'S "ACTIVITIES" WOULD BE PREJUDICIAL TO THE PUBLIC INTEREST

A. The Plain Language Of The Statute Supports Respondents' Position That Only "Activities", Not Mere "Presence Or Entry", Can Provide The Basis For Denial Of A Visa Or Application For Admission Under Section 212(a)(27)

The Immigration and Nationality Act ("I.N.A.", the "Act") provides:

> SEC. 212, 8 U.S.C. 1182. (a) Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States . . .
>
> (27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public

> interest, or endanger the welfare, safety, or security of the United States. . . .

Ineligibility "to receive visas" refers to the action of the consular officer at the foreign post in response to an application for a visa. I.N.A., Sec. 221(g). To be "excluded from admission" refers to the action of the Attorney General (acting through immigration officers at the port of entry) in inspecting the visa holder and making an independent determination of admissibility. I.N.A., Sec. 221(h).

Noting that the statute does not speak of "presence" as a basis for exclusion, the court below found that the "plain thrust of the language of subsection (27)", as measured by traditional canons of statutory construction, supported respondents' position that denial of a visa or application for admission under 212(a)(27) can be only on the basis of "activities", not on the basis of mere "presence". *Abourezk v. Reagan*, 785 F.2d 1043, 1054 (D.C. Cir. 1986).

Justice Scalia has recently referred, with approval, to "the venerable principle that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity." He continued: "Judges interpret laws rather than reconstruct legislators' intentions. Where the language of those laws is clear, we are not free to replace it with an unenacted legislative intent." *I.N.S. v. Cardoza-Fonseca*, No. 85-782, ____ U.S. ____ (1987) (Scalia, J., concurring).

The "venerable principle" cited by Justice Scalia should guide this Court in its approach to I.N.A., Sec. 212(a)(27), which prohibits the admission of an alien who seeks to enter the United States "solely, principally, or incidentally *to engage in activities* which would be prejudicial to the public interest . . ." (emphasis added). Unless Congress now wishes to amend the statute, by adding after the quoted language, "or whose presence in or entry into the United States would be prejudicial to the public interest," the decisions of consular officers or of the Attorney General (acting through immigration officers at the port of entry) should adhere to the plain language of the statute, and should focus on the planned or probable "activi-

ties" that an applicant for a visa or for admission would undertake in the United States.

B. The Legislative History Of Section 212(a)(27) Confirms That Its Core Purpose Was To Deny Visas To Diplomats Who Would Use Those Visas To Enter The United States In Order To Engage In "Subversive Activity"

The "prejudicial to the public interest" language of Section 212(a)(27) of the Immigration and Nationality Act is derived from the language of a predecessor statute, the Internal Security Act of 1950, Sec. 22(1), 64 Stat. 987, 1006 (repealed 1952). The 1952 statute made one change in replacing "or would endanger the welfare or safety of the United States" with "or would endanger the welfare, safety, or *security* of the United States" (emphasis added).

The legislative history of the predecessor of 212(a)(27) shows clearly that its core purpose was to deny visas to diplomats from "Iron Curtain" countries who, it was feared, would use those visas to enter the United States and then engage in "overt acts endangering the public safety." 96 Cong. Rec. 14179 (1950). In presenting to the Senate a section-by-section analysis of the bill, Senator Pat McCarran, the bill's chief sponsor, described the predecessor to 212(a)(27) as aimed at "overt acts":

> The first provision would require the exclusion and deportation of all aliens irrespective of their status if they seek entry to engage or engage after entry in activities endangering the public safety. . . . Mr. President, in those cases in which aliens in diplomatic status seek to enter the United States to engage in or are caught engaging in espionage, sabotage, or other overt acts endangering the public safety, they will be subject to exclusion or deportation.

It was the use of diplomatic status as a "screen" for "subversive activity" that was the prime target of the Internal Security Act's predecessor to I.N.A., Sec. 212(a)(27), 96 Cong. Rec. 14180 (1950):

> The bill will permit Communists to enter the country, so long as they come here for diplomatic business, and so long as they confine themselves to the usual and reasonable activities of a diplomat. What the bill will do, which is not possible under present law, is to permit the deportation of a Communist who comes here under diplomatic or semidiplomatic status and then uses that status as a screen behind which to carry on subversive activity.

Senator McCarran's clear and repeated explanation to the Senate of the purpose of the predecessor to 212(a)(27) indicates Congress' specific intent with respect to its meaning when it adopted the Internal Security Act of 1950—the full title of which, it should be recalled, was "The *Subversive Activities* Control Act of 1950" (emphasis added). In such a case, the Court only "enforces that intent" and has no need to look to administrative construction of the statute. *Abourezk*, *supra*, at 1053, citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The unambiguous statement by Senator McCarran that the purpose of the predecessor to 212(a)(27) was to prevent the granting of a visa or admission to an alien whose purpose it was to engage in subversive activity subsequent to entry is confirmed by the House Report, two Senate Reports, and the Conference Committee Report.[1] The first of the two Senate Reports (S. Rep. No. 2230, 81st Cong., 2d Sess. 5 (1950)), to accompany the bill entitled "Exclusion and Expulsion of Subversive Aliens from the United States," stated that its purpose was "to strengthen the provisions of existing law which [*sic*] respect to the exclusion and deportation of subversive aliens." The Senate's overriding concern with the "activities" that such

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1 H.R. Rep. No. 2980, 81st Cong., 2d Sess. 1 (1950); S. Rep. No. 2230, 81st Cong., 2d Sess. 5 (1950) (to accompany S. 1832, "Exclusion and Expulsion of Subversive Aliens from the United States"); S. Rep. 2369, 81st Cong., 2d Sess. 10 (to accompany S. 4037, the "omnibus bill" entitled "Protecting the Internal Security of the United States"); H.R. Rep. No. 3112, 81st Cong., 2d Sess. 54 (1950) (Conference Committee). The House and Conference Committee Reports are published in U.S. Code Cong. Serv. 1950, pp. 3886, 3899.

aliens might engage in after effecting an entry is highlighted by passages like these (*id.* at 10):

> Agents of communism have used the customary courtesy extended by the United States to representatives of foreign governments, including diplomats, consuls, and other representatives, as a screen behind which to engage in espionage and other activities designed to overthrow our democratic form of government by force and violence.

The House Report (H.R. 2980, 81st Cong., 2d Sess. 1 (1950)), accompanying the bill entitled "Protection of the United States against Un-American and Subversive Activities," expresses a similar concern about the danger to United States "security interests" of "activities . . . carried on by secret and conspiratorial methods," and of "activities" that "constitute an immediate and powerful threat to the security of the United States and to the American way of life." To substantiate this concern, the House Report refers to the hearings that provided "irrefutable evidence" that Communist agents in the United States were "engaged in the training of espionage specialists who are taught to infiltrate and destroy our Government from within." *Id.* at 6.

With respect to Section 22(1) of the Internal Security Act, the Senate Reports refer to the provision as "an admixture of existing law and the new provisions of the bill", and describe "existing law" in this way:

> Under existing law, among the excludable aliens are certain aliens who seek to enter the United States whose entry would be prejudicial to the public interest or would endanger the safety of the United States. The committee has broadened this class of excludable aliens to include those aliens who seek to enter the United States to engage in activities which would endanger the welfare of the United States.

Treating the reference to "entry" under "existing law" as a polar opposite to the reference to "activities" in the new law,

the dissent below argued that the Internal Security Act's predecessor to 212(a)(27) had "broadened" the "existing law" which prohibited only prejudicial "entry" by adding prejudicial "activities". *Abourezk*, *supra*, at 1065.

This interpretation misunderstands the relationship between "existing law" and the Internal Security Act, and misreads the Senate Reports. The Internal Security Act is "broadened" by comparison to "existing law" not to add "activities" to "entry" but to add "or would endanger the welfare . . . of the United States" to "or would endanger the public safety of the United States." The Internal Security Act also prohibits prejudicial "activities" whether they were engaged in "solely, principally, or incidentally"—the latter provision reflecting Senator McCarran's concern about diplomats who might use their status as a "screen" behind which to engage "incidentally" in subversive activity.

The "existing law" referred to in the Senate reports was a 1948 statute entitled "An Act to amend the immigration laws to deny admission to the United States of aliens who may be coming here *for the purpose of engaging in activities* which will endanger the public safety of the United States." 62 Stat. 268 (emphasis added). It would be difficult to imagine a clearer expression of Congressional concern not to prevent "admission" in the abstract, but to prevent an "admission" obtained for the express "purpose" of engaging in harmful "activities". The 1948 statute amended the 1918 immigration law, 40 Stat. 1012, by adding to the inadmissibility of anarchists the inadmissibility of an alien:

> who the Attorney General knows or has reason to believe seeks to enter the United States for the purpose of engaging in activities which will endanger the public safety of the United States.

The Senate Reports to the Internal Security Act of 1950 which refer to "existing law" fully understood that "existing law" was directed against "activities", and that the new bill "broadened" the "existing law" to expand the *range* of "activities" that were prohibited. S. Rep. No. 2230, *supra*, at 8

(deletions and additions). The reference in the Reports to "entry" should not be read in the abstract and outside of its historical context as an incorrect assertion that "existing law" permitted a finding of inadmissibility merely if "entry", without either the threat or fact of activities, were prejudicial to the public interest.[2]

This was also the understanding of the Conference Committee, which compared the Internal Security Act to "existing law" in this manner (H.R. Rep. No. 3112, 81st Cong., 2d Sess. 54 (1950)):

> Paragraph (1) provides for the exclusion from the United States of aliens seeking to enter for the purpose of engaging in activities which are prejudicial to the public interest and dangerous to the welfare or safety of the United States, whether or not such aliens seek to enter the United States solely, principally, or incidentally for such purpose. Existing law merely provides for the exclusion of aliens if the Attorney General knows or has reason to believe that such aliens are seeking to enter the United States to engage in activities which would endanger the public safety of the United States.

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2 The dissent, *Abourezk*, *supra*, at 1065, treats the 1948 law as merely an extension to the Attorney General of the authority previously granted to consular officers under a 1941 law prohibiting the grant of a visa to an alien who might be coming to the United States "for the purpose of engaging in activities which will endanger the public safety of the United States." 55 Stat. 252. According to the dissent, the legislative history of the 1941 law indicates that it should be read, despite its specific reference to "activities", to include an "entry" that would endanger the public safety. Even if the dissent were correct in its reading of the 1941 law, that law was not the "existing law" referred to in the Congressional reports to the Internal Security Act of 1950, which concerned the authority of the Attorney General to deny admission. Furthermore, the supremacy of the Attorney General over consular officers and the Department of State in matters of law, I.N.A., Sec. 103(a), reduces, if it does not eliminate, the relevance of any legislative history pertaining to the granting and refusal of visas by consular officers under the 1941 law.

The lower court, after reviewing the Senate Reports that spoke of "entry" and did not specifically mention "activities", and the Conference Committee report that spoke of "activities", concluded that the legislative history was ambiguous and remanded for examination of the administrative practice of visa granting or refusal under 212(a)(27).

C. Administrative Construction Of The Statute By The Attorney General And The State Department Shows That Only "Activities" Can Provide The Basis For Denial Of A Visa Or Application For Admission Under Section 212(a)(27)

The Immigration and Nationality Act provides that the Attorney General "shall be charged with the administration and enforcement of this Act", and that "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." I.N.A., Sec. 103(a). The "granting or refusal of visas" is entrusted to consular officers. I.N.A., Sec. 104(a).

Although the application for a visa and its granting or refusal is within the authority of the consular officer, the legal question of visa eligibility is for the Attorney General, not the consular officer or the Department of State, to decide. The separation of functions between the Attorney General and the Department of State is described in the House Report to the Immigration and Nationality Act (H.R. Rep. No. 1365, 82nd Cong., 2d Sess. 35 (1952)) with this illustration:

> For example, rulings which may be issued by the Attorney General relating to the provision of the bill governing the admissibility of aliens will be controlling with respect to a determination of aliens who are admissible and will be binding on the Secretary of State with respect to determinations of whether an alien is eligible for a visa. On the other hand, the Secretary of State will have control over all questions relating to the manner in which the powers, duties, and functions of consular and diplomatic officers are to be administered.

1. Administrative Construction by the Attorney General

Since the enactment of the Immigration and Nationality Act in 1952, three precedent decisions have required administrative construction by the Attorney General of the "prejudicial to the public interest" language of 212(a)(27). In the leading case, *Matter of M-*, 5 I. & N. Dec. 248 (1953), the Board of Immigration Appeals (the "Board") reversed a decision of the Special Inquiry Officer finding a pacifist leader from England excludable on the basis of his intent "incidentally" to engage in "activities" in the United States that would be "prejudicial to the public interest" within the meaning of 212(a)(27). These scheduled "activities" included delivering talks and participating in discussion groups with United States citizens on such subjects as the rearmament of Germany, England's view of the Korean war, nonviolent resistance to apartheid in South Africa, and conditions in Yugoslavia. The applicant's prior conviction for violating the Official Secrets Act of Great Britain in having received secret papers concerning government strategy in India provided a basis for the Special Inquiry Officer's belief that the applicant might engage in "activities" that came within the ambit of 212(a)(27).

The Board first examined the legislative history of 212(a)(27), finding that the provision was directed against "subversives", but that its language was broad enough to include individuals other than "subversives". The Board then examined in some detail the applicant's firmly held pacifist beliefs. It observed that the applicant's views "may be unpopular in the United States, and some of his opinions may be in conflict with policies of his Government." The Board emphasized, however, that the "unpopularity in the United States of the views advocated by a person seeking admission would apparently not be a test of whether admission of the person would be prejudicial to the public interest, for persons who advocate totalitarianism (as long as they do not advocate establishment of a dictatorship in the United States) are admissible under the Immigration and Nationality Act."

The Board stated that the Special Inquiry Officer could not have excluded the applicant on the basis of his opinions and beliefs, but, rather, must have done so as a result of his "fear that a person who places his conscience above the law and who has once received government documents in defiance of the law may engage in activities prejudicial to the best interest of the United States if permitted to enter, and to this is added the thought that his remarks will be critical of United States policies and the consequence of his visit may result in enlarging the group which object[s] to service in the armed forces."

Examining the provisions of the Immigration and Nationality Act that permit aliens who served as non-combatants in the armed forces or performed work of national importance in lieu of armed service to be naturalized (Section 337(a)), and the Supreme Court decision holding that religious pacifists are not barred from holding public office, *Girouard v. United States*, 328 U.S. 61 (1946), the Board concluded that the "activities" of a fervent pacifist cannot be "activities prejudicial to the public interest" within the meaning of 212(a)(27).

Stated narrowly, *Matter of M-* holds that the activities of a pacifist are not "prejudicial to the public interest" within the meaning of the statute. Stated more broadly, the decision stands for the rule that the Board will look not to the opinion or belief of the applicant for admission, but to his probable "activities" in evaluating admissibility under 212(a)(27). If the "activities" are not "prejudicial to the public interest", the alien's admission will not be denied under 212(a)(27). Although the terms "presence or entry" are not used in opposition to "activities," a fair reading of *Matter of M-* is that "presence or entry" alone, distinct from probable "activities prejudicial to the public interest", cannot form the basis for exclusion of the applicant for admission. If the Attorney General has articulated this rule with respect to applicants for admission at the port of entry, that "determination and ruling" should also be implemented by consular officers with respect to the granting or refusal of visas at consular posts. I.N.A., Sec. 103(a).

Matter of M- was followed in *Matter of Rivero-Diaz*, 12 I. & N. Dec. 475 (1967), where the Board sustained the exclusion of

an anti-Castro Cuban national under 212(a)(27) and (29), despite the fact that his "actions" on behalf of his cause "would undoubtedly arouse the sympathy of many United States citizens and would be popular with many opposed to Castro and what he represents," since his record showed that he would probably "continue such prohibited activity" if admitted into the United States.

Showing its concern about the occasional misuse by Special Inquiry Officers of 212(a)(27) as a catch-all for other provisions of the statute, the Board, in *Matter of McDonald and Brewster*, 15 I. & N. Dec. 203 (1975), found that the "activities prejudicial to the public interest" language could not be applied to cover the importation for personal use of several marijuana cigarettes, properly prohibited under a separate section of the Act. The Board there cited an earlier unpublished decision, *Matter of Zamora*, A-10550431 (March 11, 1958), in which it had held 212(a)(27) inapplicable to a case involving conspiracy to smuggle aliens into the United States, which was properly prohibited under a separate section of the Act.[3]

In all three precedent decisions rendered by the Board, and in the non-precedent decision cited by the Board in *Matter of McDonald and Brewster*, it is "activities", not mere "presence or entry", that trigger the "prejudicial to the public interest" language of the statute. And the Board is scrupulously careful in disallowing use of 212(a)(27) where a separate provision of the statute may properly be applied.

2. Administrative Construction by the State Department

The State Department, in its Foreign Affairs Manual, has provided guidance to its consular officers in the form of "illustrations" with respect to the granting or refusal of visas under 212(a)(27). Foreign Affairs Manual, Pt. II ("F.A.M."),

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3 The Board has not maintained an Index of unpublished decisions for the period prior to 1966; its Index of unpublished decisions covering the period from 1966 to the present does not reveal any decision addressing 212(a)(27) inadmissibility.

§ 41.91(a)(27), reprinted in Gordon & Rosenfield, *Immigration Law & Procedure* ("G & R") 32-214.18 (1985).

The first three illustrations point clearly to the threat of "activities" of a conspiratorial, terrorist, or underworld character, and are in accord with the Attorney General's construction of the statute in *Matter of M-*, *supra*. The fourth illustration does not refer directly to the threat of activities subsequent to entry, but refers in the present tense to aliens who "are notorious" for actions that include "physical brutality while in political power in their native land. . . ."

The Act requires that instructions to consular officers promulgated by the State Department be consistent with the "determination and ruling" of the Attorney General. I.N.A., Sec. 103(a). In order for the fourth illustration to be consistent with the Attorney General's construction of the statute in *Matter of M-*, *supra*, it should be read to include the requirement that the consular officer believe that the "notorious" perpetrator of abuses who is applying for a visa might engage in harmful activities subsequent to entry.

But even if the fourth illustration in the Foreign Affairs Manual is read without this gloss, it should be confined by its plain meaning to aliens whose notoriety is based upon "excesses including physical brutality" while in power. The language of the illustration makes it clear that the State Department is instructing its consular officers to refuse a visa to a government agent or former agent whose conduct in power is or was shocking to the conscience of humanity. Indeed, the Department's actual practice confirms this narrow reading: the one example that the State Department offered to the court below of its use of the fourth illustration was the refusal of a visa to a former Nazi SS officer. *Abourezk*, *supra*, at 1056.

By its terms, and to remain consistent with the Attorney General's "determination and ruling" and with the statute, the fourth illustration cannot be "stretched" to cover a visa refusal to respondents, especially where the First Amendment rights of United States citizens are implicated.

II

THE McGOVERN AMENDMENT, THE WAIVER PROVISIONS OF THE ACT, AND THE FOREIGN AFFAIRS MANUAL SUPPORT THE COURT'S HOLDING THAT VISA-INELIGIBILITY UNDER 212(a)(27) SHOULD BE CONSIDERED INDEPENDENTLY OF 212(a)(28) INELIGIBILITY

The appellate court held that visa ineligibility under 212(a)(27) must be considered independently of visa ineligibility under (28), since "homogenization" of the two subsections would "evade" the purpose of the McGovern Amendment, 22 U.S.C. Sec. 2691(a)(1982). *Abourezk*, *supra*, at 1057.

In addition to the requirements of the McGovern Amendment, the court's reasoning is supported by examination of the Act's waiver provisions for 212(a)(28) ineligibility and the State Department's Foreign Affairs Manual.

A. The Statutory Waiver Scheme

The "prejudicial to the public interest" language of 212(a)(27) does not appear at any point in 212(a)(28), but its counterpart, "admission . . . in the public interest", does: exemption from ineligibility to receive a visa and be admitted into the United States may be granted if certain extenuating circumstances of membership in a proscribed organization are shown, and if both the Secretary of State and the Attorney General concur that "admission of such alien into the United States would be in the public interest." I.N.A., Sec. 212(a)(28)(I). It is the Attorney General, not the Secretary of State, who makes the final determination concerning admissibility, and where he determines that an alien presumptively ineligible under 212(a)(28) shall be admitted, he must "promptly make a detailed report to the Congress."

The opposing of "prejudicial to the public interest" in 212(a)(27) as the basis for refusal of a visa and of the application for admission, and of "admission . . . in the public interest" where an exemption from 212(a)(28) ineligibil-

ity is concerned, indicates that there is a statutory presumption that admission of an alien who is a member of a proscribed organization is "contrary to" or "prejudicial to the public interest." That presumption can be rebutted under the Act by the joint recommendations and findings of the Secretary of State and the Attorney General, and it is now rebutted by the McGovern Amendment. The statutory scheme supports the statement of the court in *Allende v. Shultz*, 605 F. Supp. 1220 (D. Mass. 1985), that, whatever 212(a)(27)'s "prejudicial to the public interest" language includes, it does not include any of the ineligibility grounds of subsection (28).

The Act further provides that the consular officer or Secretary of State may recommend to the Attorney General that an alien who is ineligible to receive a visa and be admitted into the United States under any of the provisions of 212(a) except for 212(a)(27), (29) (saboteur), or (33) (Nazi persecutor) be granted a visa and admitted despite his inadmissibility, and the Attorney General may admit him in his discretion. I.N.A., Sec. 212(d)(3), 22 C.F.R. § 41.95. 8 C.F.R. § 212.7.

The strikingly different statutory treatment of 212(a)(27) and (28)—providing several kinds of "forgiveness" for membership in or affiliation with a prohibited organization but none for an intention to enter the United States for the purpose of engaging in "subversive activities"—argues strongly that the "foreign policy concerns" that might affect a determination of inadmissibility under 212(a)(27) be considered entirely apart from and "independent of" the question of 212(a)(28) ineligibility.

B. The State Department's Foreign Affairs Manual

With respect to the consideration of visa eligibility under 212(a)(27), the State Department's Foreign Affairs Manual provides:

> It was the intent of Congress that the provisions of paragraph (27) of Section 212(a) of the Act be used to safeguard the security of the United States. They must not be used as "catch-all" provisions for refusing visas in cases which do not fit in other paragraphs of Section 212(a).

F.A.M., § 41.91(a)(27), reprinted in G & R, 32-214.18 (1985).

The State Department's directive to consular officers to confine 212(a)(27) to "security" cases and to bar its use as a "catch-all" provision supports the lower court's holding that 212(a)(27) and (28) ineligibility be considered independently. Additional support is found in the State Department's differing practices on the provision of advisory opinions to consular officers. Where 212(a)(27) ineligibility is involved, the consular officer must obtain an advisory opinion from the Department to assure that "uniform" and "consistent" determinations of such applications will be made. F.A.M., § 41.91(a)(27), G & R, 32-214.18 (1985). No such advisory opinion is required where a visa applicant appears to be ineligible under 212(a)(28) (an advisory opinion is required only on the question of whether membership in a proscribed organization was "non-meaningful", F.A.M., § 41.9(a)(28), G & R, 32-218 (1979)).

The implication of this differing treatment is that ineligibility under 212(a)(28) is a relatively routine matter that the consular officer can decide without guidance from his superiors in the Department, except on the subtle legal question of "non-meaningful" membership. By contrast, the question of what activities are "prejudicial to the public interest" is a complex matter that requires that the consular officer presented with the application seek guidance from the Department. The State Department's own line-drawing between the two subsections argues that it should consider ineligibility under one independently of ineligibility under the other.

III

THE STATE DEPARTMENT'S DENIAL OF VISAS TO TOMAS BORGE, NINO PASTI, OLGA FINLAY AND LEONOR RODRIGUEZ LEZCANO VIOLATES RESPONDENTS' FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION AND IDEAS

This case confronts the Court not only with questions of statutory interpretation, but also with broader constitutional issues. When government action pursuant to Sections 212(a)(27) and (28) of the Immigration and Nationality Act

conflicts with the fundamental First Amendment rights of American citizens, those rights must prevail unless there is a compelling governmental interest. There is no such interest here, and, therefore, the statutory provisions at issue should be ruled unconstitutional as applied.

A. The First Amendment Protects The Right To Receive Information And Ideas

In *Kleindienst*, *supra*, at 765, this Court recognized that First Amendment rights are implicated when American citizens invite aliens to visit this country to speak publicly and engage in "face-to-face debate".[4] In the instant case, the District Court reached the same conclusion, relying on this Court's decisions holding that "the First Amendment protects not only speech but also the right to receive information and ideas." *Abourezk v. Reagan*, 592 F. Supp. 880, 886 n. 18 (D.D.C. 1984).

Five years ago, in *Board of Education v. Pico*, 457 U.S. 853 (1982), this Court stirringly reaffirmed that basic principle, proclaiming that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." 457 U.S. at 867 (emphasis in original). The *Pico* Court explicitly rejected the Board of Education's claim of absolute discretion to remove books from school libraries, flatly stating that "[o]ur Constitution does not permit the official suppression of *ideas*." *Id.* at 871 (emphasis in original).

We submit that, at its core, the instant case is about exactly that—the official suppression of ideas. As Justice Douglas eloquently stated in *Kleindienst*:

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4 Although Dr. Ernest Mandel, a Belgian journalist and Marxist theoretician, was excludable under 212(a)(28), the Attorney General's denial of a waiver stemmed from his violation of the terms of his visa on a previous visit, when he allegedly engaged in unauthorized fund raising activity. Hence, his denial can be distinguished from those at issue here because it was not content-based. *Kleindienst*, *supra*, at 758-59.

> Thought control is not within the competence of any branch of government. Those who live here may need exposure to the ideas of people of many faiths and many creeds to further their education. We should construe the Act generously by that First Amendment standard. . . .

Kleindienst, *supra*, at 772 (Douglas, J., dissenting).

The denial of visas to Borge, Pasti, Finlay and Lezcano has unquestionably interfered with the free interchange of ideas and with respondents' rights to receive information. Therefore, the question before this Court is not merely whether those denials were statutorily proper, but also whether they were constitutionally permissible. We submit they were not.

B. The Government May Restrict First Amendment Rights Only If The Restriction is Necessary To Further A Compelling Governmental Interest, And There Is No Such Interest In This Case

Although the question of the admission or exclusion of aliens has traditionally not been the province of the judicial branch, "[w]hen Congress' exercise of one of its enumerated powers clashes with those individual liberties protected by the Bill of Rights, it is [the judiciary's] 'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated." *United States v. Robel*, 389 U.S. 258, 264 (1967). As Justice Marshall pointed out in *Kleindienst*, "all governmental power . . . is limited by the Bill of Rights." *Kleindienst*, *supra*, at 782-783 (Marshall, J., dissenting).

We do not challenge the executive branch's authority to exclude individuals who would engage in criminal or subversive activities upon entry to the United States. However, when the executive's exclusion of an alien is based on beliefs and affiliations rather than on anticipated participation in harmful activities, that exclusion amounts to a prior restraint of the free speech rights of the alien's prospective audiences. According to this Court, "the First Amendment tolerates absolutely no prior judicial restraints . . . predicated upon surmise or conjecture that untoward consequences may result." *New York Times Co. v. United States*, 403 U.S. 713, 725-26 (1971) (Brennan, J.,

concurring). That case, the "Pentagon Papers" case, concerned prior restraint of the press, but the same basic principle should apply here. The ideological exclusion of Borge, Pasti, Finlay and Lezcano serves no compelling government interest; in fact, it does not even serve a valid government interest. Our government is constitutionally prohibited from placing limitations on the opportunity of American citizens to be exposed to ideas. *See Lamont v. Postmaster General*, 381 U.S. 301 (1965).

This Court has not yet been called upon to decide a case involving a constitutional challenge to 212(a)(27). When this Court earlier confronted a challenge to the constitutionality of 212(a)(28) it decided the case on the narrow ground that the plaintiffs—United States citizens who had invited the alien to give a speech—could not compel the Attorney General to grant the alien a waiver of visa ineligibility under I.N.A., Sec. 212(d)(3) when the alien had violated terms of a previous waiver. *Kleindienst*, *supra*, at 769 (1972).

In the case at bar, by contrast, we do not urge that the United States citizens who invited the aliens have the power to require the Attorney General to grant a waiver of inadmissibility—indeed, no waiver is provided for Section 212(a)(27) inadmissibility. Rather, we maintain that the government's use of Section 212(a)(27) in place of 212(a)(28) has enabled it to refuse visas on the basis of its wish to silence discussion of matters of public interest and concern. We further maintain that the State Department has flouted the Attorney General's holding in *Matter of M—*, *supra*, that a determination of inadmissibility on the basis of the applicant's expression of "unpopular" opinion is contrary to Section 212(a)(27).

The Board of Immigration Appeals has no authority to determine a constitutional question, *Baques-Valles v. I.N.S.*, 779 F.2d 483 (9th Cir. 1985), and made no such determination in *Matter of M—*. This Court does have that authority. We urge this Court to hold that the visa refusals in this case were not only violative of the statute, but violative of the First Amendment rights of the United States citizen respondents.

C. Section 212(a)(27) Is Inconsistent And Incompatible With This Court's Interpretation Of The First Amendment

Three years ago, the Committee on Immigration and Nationality Law of the Association of the Bar of the City of New York prepared a detailed report on the exclusion provisions of Sections 212(a)(27) and (28). *See* p. 4, *supra*. Apart from the question of their constitutionality, the report found that the government's exclusions under Sections 212(a)(27) and (28) have damaged our nation's intellectual, cultural, and political life and marred our moral image, here and abroad. The Committee concluded:

> [W]e believe that denials of visas based solely on the applicants' alleged political beliefs or affiliations have no place in our immigration laws. It is incongruous to exclude advocates of Communist or other ideologies when their domestic counterparts run for public office and enjoy the right of free speech, and hypocritical to do so while we boast and even preach of that domestic freedom.

Immigration Committee Report at 19.

This conclusion is consistent with the role this Court has attributed to the First Amendment's free speech guarantee in safeguarding and promoting American democracy. Throughout its history, the Court has praised the ideal of "free trade in ideas" on numerous occasions. *See, e.g., Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, ____ U.S. ____, 107 S. Ct. 616 (1986). Twenty-three years ago, Justice Brennan acknowledged our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . " *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Perhaps the most eloquent tribute to the First Amendment as the guarantor of American self-government was written sixty years ago by Justice Brandeis, who proclaimed:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative

> forces should prevail over the arbitrary. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

This basic proposition reflects the shared beliefs of the American public. To exclude such aliens, we submit, underestimates the American people and offends this country's free-speech traditions. Consequently, such exclusions should no longer be tolerated.

D. Section 212(a)(27) Is Unconstitutionally Vague And Overbroad

1. Vagueness

A statute may be considered void for vagueness when it " 'either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application'." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) (citing and quoting from *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)). In the free speech area, this Court has stated that "[t]hese freedoms are delicate and vulnerable, as well as supremely precious in our society. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with *narrow specificity*." *NAACP*, *supra*, at 433 (emphasis added).

It has already been shown that Section 212(a)(27) of the Immigration and Nationality Act implicates the First Amendment rights of Americans who invite aliens to visit this country to speak publicly. *See* Section IIIA, *supra*. We contend that to

the extent this statute encompasses aliens seeking to enter the United States "solely, principally or incidentally to engage in activities . . . prejudicial to the public interest", it is unconstitutionally vague. It chills the rights of Americans to plan programs with the participation of aliens by failing to define what sort of activities will be considered "prejudicial to the public interest", or to explain how an individual can "incidentally" engage in such activities. These are fatal flaws, and Section 212(a)(27) should therefore be struck down as void for vagueness.

2. Overbreadth

This Court has held that the government's "power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell*, *supra*, at 304.

The protected freedom affected by Section 212(a)(27) is the First Amendment freedom to receive information and ideas. *See* Section IIIA, *supra*. Since the statute has been interpreted to exclude aliens invited to speak in this country even in cases when there has been no legitimate compelling government interest to do so, it is also unconstitutionally overbroad. *See* Section IIIB, *supra*.

IV

THE STATE DEPARTMENT'S DENIAL OF VISAS ON IDEOLOGICAL GROUNDS IS INCONSISTENT WITH MAJOR INTERNATIONAL INSTRUMENTS

It is a basic canon of statutory construction that statutes should be construed in a manner consistent with international law. Chief Justice Marshall long ago observed that "an Act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. The Charming Betsey*, 6 U.S. (2 Cranch.) 64, 118 (1804). Section 134 of the *Restatement of Foreign Relations Law of the United States* (Rev., Tent. Draft No. 6, April 12, 1985) similarly provides, "[w]here

fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law or with an international agreement of the United States." The government has ignored this principle in its construction of Section 212(a)(27) of the Act.

The United States has subscribed to international instruments that recognize the right of American citizens to receive visitors into our country and hear what they have to say. The most important of these instruments relates to our membership in the United Nations. The United Nations Charter itself, of which the United States was a principal sponsor, provides that a central purpose of the organization is "promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex or religion."[5]

To carry out this mandate, the United Nations in 1948, under the leadership of the United States, adopted the Universal Declaration of Human Rights. Article 19 gave forceful recognition to the "right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information through any media and regardless of frontiers."[6]

The Universal Declaration is no barren philosophical tract. As stated by the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980):

> [A] Declaration creates an expectation of adherence, and 'insofar as the expectation is gradually justified by State practice, a declaration may by custom become recognized as laying down rules binding upon the States'. . . . Indeed, several commentators have concluded that the Universal Declaration has become, *in toto*, a part of binding, customary international law.

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5 Charter of the United Nations, Art. 1, § 3.

6 Universal Declaration of Human Rights, signed Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/180 (1948), Art. 19.

The United Nations in 1966 adopted the International Covenant on Civil and Political Rights (the "Civil and Political Covenant").[7] Article 19, paragraph 2 provides:

> Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any media of his choice.

President Carter signed the Civil and Political Covenant and submitted it to the Senate for consent to ratification in 1978. As a result of signing the agreement with a view to ratification, the United States "is obliged to refrain from acts that would defeat the object and purpose of the agreement." *Restatement of Foreign Relations* § 312(3). *Accord* Vienna Convention on the Law of Treaties, Article 2.[8]

The United States is also a signatory to another significant international instrument respecting freedom of speech and travel. The free speech and press provisions of that instrument, the Final Act of the Conference on Security and Cooperation in Europe (the "Helsinki Final Act"),[9] are frequently relied on by United States officials as a basis for criticizing other nations. For instance, in a recent speech to the United Nations General Assembly, President Reagan criticized the Soviet Union for seizing Nicholas Daniloff in violation of the protections afforded journalists by the Helsinki Final Act.[10] A year earlier, the State Department had complained to the Soviet Union that its jamming of broadcasts from the West violated the Helsinki Final Act.[11]

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7 Adopted and approved for signature, ratification and accession on Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (1966).

8 Adopted and opened for signature, May 22-23, 1969, by the U.N. Conference on the Law of Treaties; U.N. Doc. A/CONF. 39/27 (1969).

9 Final Act of the Conference on Security and Co-Operation in Europe, Aug. 1, 1975, 73 Dept. of State Bull. 323-350.

10 *See* The New York Times, Sept. 23, 1986, at 1, col. 6.

11 *Ibid.*

This document applies not only to the Soviets, but to our government and its interpretation of the Immigration and Nationality Act as well. The Helsinki Final Act provides that the "participating States [of which the United States is one] will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion."[12] It further calls upon all participating nations to "facilitate wider travel by their citizens for personal or professional reasons and to this end . . . to administer flexibly the procedures for exit and entry."[13] The participating States agreed to make it their aim "to facilitate the freer and wider dissemination of information of all kinds, and to encourage co-operation in the field of information and the exchange of information with other countries . . . ."[14] In furtherance of these goals, the participating States expressed their intention:

> [t]o facilitate the dissemination of oral information through the encouragement of lectures and lecture tours by personalities and specialists from the other participating States, as well as exchanges of opinions at round table meetings, seminars, symposia, summer schools, congresses and other bilateral and multilateral meetings.[15]

A major purpose of the McGovern Amendment was to fulfill these very requirements of the Helsinki Final Act. S. Rep. No. 194, 95th Cong., 1st Sess. 13 (1977), U.S. Code Cong. and Admin. News 1977, pp. 1625, 1635. In addition, Congress has made protection of free speech rights part of our international human rights policy. Since 1976, Congress has required the Department of State to report on the status of human rights in other countries. *See, e.g.*, International Security Assistance and Arms Control Export Act of 1976, Pub. L. No. 94-329, § 502B(b), 22 U.S.C. § 2304(b). Each year, the

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12 73 Dept. of State Bull. 325.

13 *Id.* 340

14 *Id.* 341

15 *Ibid.*

State Department complies by submitting to Congress a document entitled "Country Reports on Human Rights Practices" which prominently includes a section entitled "Respect for Civil Liberties: Freedom of Speech and Press."

These international instruments plainly require the United States, at a minimum, to make all reasonable efforts to permit aliens—even those with views disagreeable to the government—to enter this country and speak to American citizens who have invited them to engage in an exchange of views. Established principles of statutory construction require that the statute here in question be construed consistently with those instruments. Yet rather than ease its regulations regarding foreign travelers and open its public forums to different points of view, the government has read the McGovern Amendment narrowly and has prevented the aliens who are respondents' invitees from entering our land simply because it does not like what they may have to say. The Court should not infer a Congressional intention to flout international instruments to which the United States has subscribed.

CONCLUSION

For the reasons stated above, the two certified questions should be answered in the affirmative, the judgment of the court of appeals should be affirmed, and the appeal should be dismissed.

Respectfully submitted,

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April 1987